

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

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IN RE:
VITAMINS ANTITRUST LITIGATION

NANCY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

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) Misc. No. 99-197 (TFH)
) MDL No. 1285
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THIS DOCUMENT RELATES TO:
ALL ACTIONS

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MEMORANDUM OPINION Re: Certification of Hague Issue

Pending before the Court are Motions by certain foreign defendants¹ to (1) amend and certify for interlocutory appeal the portion of this Court's September 18, 2000 Memorandum Opinion and Order adopting the Special Master's recommendation that jurisdictional discovery proceed under the Federal Rules of Civil Procedure ("Federal Rules") rather than the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters²; and to (2) stay jurisdictional discovery pending resolution of this appeal. Upon careful consideration of these Motions, the plaintiffs' opposition, the defendants' replies, and the entire record herein, the Court will grant the Motion to Amend and Certify and will decline the request for a stay of jurisdictional discovery pending the appeal.

I. BACKGROUND

On September 18, 2000, this Court issued a Memorandum Opinion and Order adopting the Special Master's recommendations that jurisdictional discovery proceed under the Federal

¹ The Motions were filed by BASF AG ("BASF"), F. Hoffman-La Roche Ltd. ("Roche"), Rhone-Poulenc S.A. ("RPSA"), UCB S.A. ("UCB"), Degussa-Huls AG ("Degussa"), E. Merck, and Merck KGaA (collectively "foreign defendants").

² See 23 U.S.T. 2555, T.I.A.S. No. 7444, 28 U.S.C. § 1781.

Rules of Civil Procedure rather than the Hague Convention. In particular, the Court rejected the foreign defendants' arguments that litigants are required to use the Hague Convention procedures as a first resort for conducting jurisdictional discovery against the foreign defendants. Instead, the Court held that the three-factor balancing test established by Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa, 482 U.S. 522 (1987), applies to jurisdictional discovery involving the Hague signatories in this case and that principles of comity and international territorial preference apply to jurisdictional discovery involving the two non-signatory foreign defendants. Finally, the Court found that in this case the Federal Rules of Civil Procedure should govern the jurisdictional discovery of all eight foreign defendants.

Shortly thereafter, motions were filed by these foreign defendants pursuant to 28 U.S.C. § 1292(b) for an order certifying this Court's September 18, 2000 Memorandum Opinion and Order for immediate interlocutory appeal and amending that Order to include the following statement:

In the opinion of the Court this Order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and an immediate appeal from the order may materially advance the ultimate termination of the litigation. Accordingly, this Order is certified for immediate appeal pursuant to 28 U.S.C. § 1292(b).

In their Motions, the foreign defendants also requested that this Court stay jurisdictional discovery in this case pending resolution of any appeal.

II. DISCUSSION

Pursuant to 28 U.S.C. § 1292(b), the foreign defendants have moved for an order certifying for interlocutory appeal the Court's September 18, 2000 ruling that jurisdictional discovery in this case should proceed under the Federal Rules rather than the Hague Convention. The decision of whether to allow an immediate interlocutory appeal of a non-final order under section 1292(b) is within the discretion of the district court. Swint v. Chambers County Comm'n, 514 U.S. 35 (1995). When deciding a motion for certification, the district court must consider the following factors: (1) whether the motion to be appealed involves a controlling question of law; (2) whether an immediate appeal from the order may materially advance the ultimate termination of the litigation; and (3) whether there is a substantial ground for difference of opinion on that question of law. 28 U.S.C. § 1292(b); First American Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1116 (D.D.C. 1996). However, interlocutory appeals under 28 U.S.C. § 1292(b) are rarely allowed, and the party seeking interlocutory review has the burden of persuading the court that "exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment. First American Corp., 948 F. Supp. at 1116. A motion for certification should not be granted merely because a party disagrees with the ruling of the district court. See Daetwyler Corp. v. R. Meyer, 575 F. Supp. 280, 282 (E.D. Pa. 1983).

Applying these principles, the Court turns to the instant motion for certification. The parties cannot seriously dispute that the issue of whether jurisdictional discovery should proceed under the Hague Convention or the Federal Rules is a controlling issue of law in this case. However, the Court must also determine whether there is a substantial ground for difference of

opinion on this question of law. First American Corp., 984 F. Supp. at 1116; see also Boese v. Paramount Pictures Corp., 952 F. Supp. 550, 560 (N.D. Ill. 1996). The mere fact that a substantially greater number of judges have resolved the issue one way rather than another does not, of itself, tend to show that there is no ground for difference of opinion. See Daetwyler Corp., 575 F. Supp. at 283. It is the duty of the district judge faced with a motion for certification to analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is a substantial ground for dispute. See id. Although this Court firmly believes that the facts of this case warrant a ruling in favor of application of the Federal Rules to jurisdictional discovery, the Court recognizes that the arguments in support of the opposite conclusion are not insubstantial. See, e.g., Jenco v. Martech Int'l, Inc., No. 86-4229, 1988 WL 54733 (E.D. La. May 19, 1988) (holding that Federal Rules do not apply when party is seeking jurisdictional discovery: "While judicial economy may dictate that the Federal Rules of Civil Procedure should be used, the interests of protecting a foreign litigant in light of the jurisdictional problems are paramount"). Therefore, the Court finds that there is a ground for difference of opinion sufficient to warrant certification of this question for appeal in light of the other facts and circumstances of this case.³

However, even if this Court finds that the issue involves a controlling question of law as to which there is substantial ground for difference of opinion, to warrant certification the Court must also find that an immediate appeal would materially advance the ultimate termination of

³ The Court notes that this issue would be effectively unreviewable after final judgment and any harm to the foreign defendants' sovereign interests would be potentially irreparable, because jurisdictional discovery would be complete long before the issue would be ripe for final appeal.

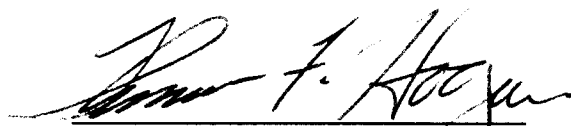
this litigation. The Court is greatly concerned with the possibility that an appeal of this preliminary ruling on the applicable rules for jurisdictional discovery could significantly delay the ultimate resolution of this action. However, should the United States Court of Appeals for the District of Columbia Circuit later reverse this Court's ruling on the applicable law for jurisdictional discovery, the Court finds that the parties would be subject to much greater delay and relitigation costs. Moreover, the Court finds that this is an important issue and that resolution of this question would assist many courts in resolving similar disputes. Therefore, the Court will allow certification of its September 18, 2000 Opinion and Order; but, in the interests of facilitating a prompt and effective resolution of this case, the Court will decline the foreign defendants' request for a stay of jurisdictional discovery pending this appeal. A stay of jurisdictional discovery would certainly thwart the prompt resolution of this matter and the Court cannot in good faith allow such delay. To protect the interests of all parties in this litigation, the Court expects the parties to seek expedited review in the United States Court of Appeals.

III. CONCLUSION

For the foregoing reasons, the Court will grant the foreign defendants' Motions to Amend and Certify the September 18, 2000 Memorandum Opinion and Order for immediate appeal. In

addition, the Court will deny the foreign defendants' Motions to Stay Jurisdictional Discovery pending resolution of the appeal. An order will accompany this Opinion.

November 22nd, 2000


Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:
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ORDER Re: Certification of Hague Issue

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that the foreign defendants' Motions to Certify the September 18, 2000
Memorandum Opinion and Order for immediate appeal are **GRANTED**. It is further hereby

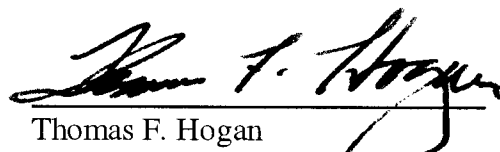
ORDERED that the September 18, 2000 Order is amended to include the following
statement:

In the opinion of the Court this Order involves a controlling
question of law as to which there is substantial ground for
difference of opinion, and an immediate appeal from the
order may materially advance the ultimate termination of the
litigation. Accordingly, this Order is certified for immediate
appeal pursuant to 28 U.S.C. § 1292(b).

And it is further hereby

ORDERED that the foreign defendants' Motions to Stay Jurisdictional Discovery
pending resolution of the appeal are **DENIED**.

November 22nd, 2000


Thomas F. Hogan
United States District Judge